United States Court of Appeals

for the Second Circuit

REPLY BRIEF

B
P/S

75-3012

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO, ROBERT E. SLATER, ALL-AMERICAN LIFE & CASUALTY COMPANY, GENERAL UNITED LIFE INSURANCE COMPANY, AND O'HARE INTERNATIONAL BANK (N.A.), *Petitioners,*

—against—

INZER B. WYATT, United States District Judge, Southern District of New York, and ROY BABITT, Bankruptcy Judge, Southern District of New York, *Respondents.*

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff,*

—against—

WEIS SECURITIES, INC., ET AL., *Defendants.*

ANSWER AND BRIEF OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION

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2

INDEX

TABLE OF CASES

STATUTES AND RULES

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ANSWER OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION

ANSWER

Answering, pursuant to Rule 21 of the Federal Rules of Appellate Procedure, the petition filed in this Court on March 3, 1975 praying for a writ of mandamus and a writ of prohibition, the Securities Investor Protection

Corporation ("SIPC"), a respondent under Rule 21, and in sequence with the paragraph numbers of the petition respectfully shows and alleges as follows:

1. Admits that the Securities Investor Protection Act of 1970 ("1970 Act") became effective on December 30, 1970, but otherwise denies the allegations contained in paragraph one and begs leave to refer to the provisions of the 1970 Act for their legal effect, and objects to and denies each and every conclusion of law contained in paragraph 1 except as they may be otherwise admitted in this respondent's brief appended hereto.

2. Admits the allegations contained in paragraph two of the petition, except those purporting to set forth the allegations and relief sought in the complaint of the Securities and Exchange Commission as to which this respondent begs leave to refer to that complaint.

3. Denies each and every allegation contained in paragraph three of the petition, except admits that on May 24, 1973 this respondent filed an application with respect to Weis Securities, Inc. ("Weis") and its customers pursuant to the 1970 Act and otherwise begs leave to refer to that application of which Exhibit A annexed to the petition is a correct copy.

4. Admits the allegations of paragraph four of the petition.

5. Admits the allegations of paragraph five of the petition.

6. Denies each and every allegation contained in paragraph six of the petition, except admits that Exhibit D annexed thereto is a correct copy of the application made by the trustee, and objects to and denies each and every conclusion of law contained in paragraph six except as they may be otherwise admitted in this respondent's brief appended hereto.

7. Admits the allegations of paragraph seven of the petition.

8. Denies each and every allegation contained in paragraph eight of the petition, except admits that petitioners held subordinated notes of Weis and that the trustee commenced various proceedings before Bankruptcy Judge Babitt with respect to the claims of such petitioners and related matters, and objects to and denies each and every conclusion of law contained in paragraph eight except as they may be otherwise admitted in this respondent's brief appended hereto.

9. Denies each and every allegation of paragraph nine of the petition, except admits that on February 14, 1975 respondent Inzer B. Wyatt sustained the order of Honorable Murray J. Gurfein entered on May 31, 1973 a correct copy of which is annexed as Exhibit E to the petition, and otherwise begs leave to refer to the transcript of the hearing before respondent Inzer B. Wyatt on February 14, 1975 a correct copy of which is annexed as Exhibit F to the petition, and lacks sufficient information upon which to admit or deny each and every allegation regarding the calendar and conditions under which Bankruptcy Judge Babitt works and the subjects purportedly argued by counsel on January 22, 1975.

10. Admits each allegation contained in paragraph 10 of the petition, except denies so much thereof as alleges "the jurisdictional basis for the reference was questioned in a recent law review article", that the issue presented by petitioners requires expedited consideration, and further denies that respondent the Honorable Inzer B. Wyatt was not "a disinterested court", and objects to and denies each and every conclusion of law contained in paragraph 10 of the petition except as they may be admitted in this respondent's brief appended hereto.

11. Admits each and every allegation contained in paragraph 11 of the petition, except denies the allegation

that "at least in that capacity he [Mr. Redington] recognizes that the 1970 Act does not authorize a reference to the courts of bankruptcy", begs leave to refer to the entirety of the report of the special task force, the relevance of which is denied, and objects to each and every conclusion of law contained in paragraph eleven except as they may be admitted in respondent's brief appended hereto.

12. Objects to and denies each and every legal conclusion contained in paragraph twelve, except as they may be admitted in this respondent's brief appended hereto.

13. Objects to and denies each and every legal conclusion contained in paragraph thirteen, except as they may be admitted in this respondent's brief appended hereto.

14. Objects to and denies each and every legal conclusion contained in paragraph fourteen, except as they may be admitted in this respondent's brief appended hereto.

15. Objects to and denies each and every legal conclusion contained in paragraph fifteen, except as they may be admitted in this respondent's brief appended hereto.

16. Objects to and denies each and every legal conclusion contained in paragraph sixteen, except as they may be admitted in this respondent's brief appended hereto, and admits that there are unresolved issues between the trustee and petitioner Exchange National Bank.

17. Denies each and every allegation contained in paragraph seventeen of the petition, except admits the existence of certain proceedings between the trustee in Weis and petitioners Robert E. Slater, General United Life Insurance, and All-American Life and Casualty Company, begs leave to refer to the pleadings therein, and objects to and denies each and every conclusion of law contained in paragraph seventeen except as they may be admitted in this respondent's brief appended hereto.

18. Admits each and every allegation contained in paragraph eighteen of the petition, except denies the petitioners' characterization of the trustee's objection and proceedings as redundant, and objects to and denies each and every conclusion of law contained in paragraph eighteen except as they may be admitted in this respondent's brief appended hereto.

19. Objects to and denies each and every legal conclusion contained in paragraph nineteen, except as they may be admitted in this respondent's brief appended hereto, except lacks sufficient information upon which to admit or deny the allegations of paragraph nineteen of the petition regarding any purported subsequent conference in the Judge's Chambers on January 22, 1975.

FIRST DEFENSE

20. Relief in the nature of mandamus or prohibition does not lie in the circumstances of this case, and this Court is without jurisdiction to entertain the petition on the merits.

SECOND DEFENSE

21. The petition fails to state a claim for relief in the nature of mandamus or prohibition.

THIRD DEFENSE

22. The relief sought by the petition herein should be denied in the circumstances of this case, in the exercise of this Court's sound discretion, by reason of the availability to the petitioners of an adequate remedy at law by way of appropriate appeal from the order of respondent Inzer B. Wyatt entered on February 14, 1975.

WHEREFORE, this respondent respectfully prays that the petition herein be dismissed with all costs to this respondent.

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-3012

EXCHANGE NATIONAL BANK OF CHICAGO, ROBERT E. SLATER, ALL-AMERICAN LIFE & CASUALTY COMPANY, GENERAL UNITED LIFE INSURANCE COMPANY, AND O'HARE INTERNATIONAL BANK (N.A.), *Petitioners*,

—against—

INZER B. WYATT, United States District Judge, Southern District of New York, and ROY BABITT, Bankruptcy Judge, Southern District of New York, *Respondents*.

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff*,

—against—

WEIS SECURITIES, INC., ET AL., *Defendants*.

BRIEF OF RESPONDENT SECURITIES INVESTORS PROTECTION CORPORATION

PRELIMINARY STATEMENT

The issues before this Court arise out of a proceeding for the liquidation of Weis Securities, Inc. ("Weis Liquidation") under the Securities Investor Protection Act of 1970 (15 U.S.C. § 78aaa *et seq.*) (the "1970 Act"). Specifically, the petitioners ask the Court to review an order of the District Court for the Southern District of New York (Hon. Inzer B. Wyatt) sustaining the validity of a prior order of that court (Hon. Murray J. Gurfein) which referred the Weis Liquidation to a Referee in Bankruptcy

"to take such further proceedings therein as are required *and permitted* under the . . . [1970 Act]" (Emphasis added).

COUNTERSTATEMENT OF ISSUES

The petitioners contend that *all* matters arising in a 1970 Act liquidation proceeding must be handled personally by the judges of the United States District Courts, and that the reference ordered by Judge Gurfein was therefore unlawful for alleged jurisdictional reasons. The principal question presented, therefore, is not whether the particular matters affecting the petitioners could properly be referred to the Referee in Bankruptcy, but rather:

> Whether when Congress vested [section 78eee (b)(2)][1] the United States District Courts with exclusive jurisdiction over a debtor and its property together with all the powers of courts of bankruptcy and reorganization courts under Chapter X of the Bankruptcy Act (to the extent consistent with the 1970 Act), it meant to preclude Referees in Bankruptcy from participating in a 1970 Act liquidation proceeding despite Congress' unambiguous mandate [section 78fff (c)(1)] that such a proceeding "shall be conducted in accordance with, and as though it were being conducted under" the provisions of chapters I through VII and X of the Bankruptcy Act (except as inconsistent with the 1970 Act) which authorize references to Referees in Bankruptcy, except for matters reserved to the District Judge (11 U.S.C. §§ 45a, 517).

SIPC respectfully submits that this question can only be answered in the negative if the plain language, import and purpose of the 1970 Act are to be given effect.

Because the petitioners elected to pursue review of Judge Wyatt's order via the extraordinary remedies of mandamus and prohibition in addition to an appeal therefrom, there is also technically present the question—

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[1] References to sections of the 1970 Act are to Title 15 of the United States Code.

> Whether, in the circumstances of this case, the writs of mandamus and prohibition lie, respectively, to compel the District Court to assume full *de novo* responsibility for all administrative and substantive matters remaining in the Weis Liquidation, and to restrain the Bankruptcy Judge from further proceedings therein.

Although SIPC contends that, if reached, this question should be answered in the negative under well settled law, it respectfully suggests the question has been mooted by the petitioner's appeal from Judge Wyatt's order which places the principal issue squarely before this Court in the usual manner.[2] SIPC consents to the disposition of that appeal at this time if the Court is so inclined, and it will therefore not develop its argument against the availability of mandamus and prohibtion beyond the footnote hereto.[3]

STATUTES INVOLVED

Although resolution of the principal issue requires consideration of the broad purposes and design of the 1970 Act which identify it as a bankruptcy proceeding in substance and effect, the provisions most directly involved are sections 78eee(b)(2) and 78fff(c)(1) which respectively provide, in pertinent part:

> "(2) Exclusive Jurisdiction Over Debtor.—
>
> * * *
>
> Upon the filing of an application pursuant to subsection (a)(2) of this section, the court to which application is

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[2] By reason of section 78fff(c)(1) of the 1970 Act, section 24a of the Bankruptcy Act (11 U.S.C. § 47a) governs the appealability of Judge Wyatt's order. *Cf.* SIPC v. Charisma Securities Corp., 506 F.2d 1191, 1193 n.2 (2d Cir. 1974). Even if that order could be viewed as an interlocutory order involving less than $500, thereby requiring leave of this court, nevertheless leave has effectively been granted by this Court's order entered on March 4, 1975.

[3] SIPC relies on the authorities cited at page 25 of the respondent trustee's brief. In further support of the proposition that the extraordinary writs do not lie and may not serve as substitute for appeal, SIPC also relies on Bankers Life and Casualty Co. v. Holland, 346 U.S. 379, 383 (1953), Ex parte Fahey, 332 U.S. 258, 259-60 (1947), United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202-03 (1945) and Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 31 (1943).

made shall have exclusive jurisdiction of the debtor involved and its property wherever located with the powers, to the extent consistent with the purposes of this chapter, of a court of bankrutcy and of a court in a proceeding under chapter X of the Bankruptcy Act. . . ."

* * *

"(c) Application of Bankruptcy Act.—

(1) General Provisions Applicable.—

Except as inconsistent with the provisions of this chapter and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96e of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive. . . ."

Section 22a of the Bankruptcy Act (11 U.S.C. § 45a)[4] on which Judge Gurfein relied provides:

> "Unless the judge or judges direct otherwise, the clerk shall refer to a referee all cases filed under Chapters I to VII, Chapter XI, and Chapter XIII of this Act."

Section 117 of the Bankruptcy Act (11 U.S.C. § 517) also provides:

> "The judge may, at any stage of a proceeding under this chapter, refer the proceeding to a referee in bankruptcy to hear and determine any and all matters not reserved to the judge by the provisions of this chapter, or to a refereee as special master to hear and report generally or upon specified matters. Only under special circumstances shall references be made to a special master who is not a referee. The appointment of a receiver in a proceeding under this chapter shall be by the judge."

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[4] Rule 102 of the Bankruptcy Rules has superseded section 22a.

SIPC's Contentions

To avoid undue repetition SIPC adopts the substance of the arguments in respondent trustee's brief and will limit this brief to matters it believes warrant emphasis and to its position (stated in the District Court below) that Judge Gurfein's order was also authorized by section 117 of the Bankruptcy Act as incorporated by section 78fff(c)(1) of the 1970 Act.

ARGUMENT

The Grant Of Exclusive Jurisdiction To The District Courts Over A Debtor And Its Property "Wherever Located" Cannot Reasonably Be Construed As Precluding References Which Fall Within The Plain Reach Of Section 78fff(c)(1) And Are Patently Not Inconsistent With The Provisions Or Purposes Of The 1970 Act.

For a protracted period the petitioners participated in proceedings before the Referee without so much as a suggestion that Judge Gurfein had unlawfully abdicated the responsibility of the District Court by his order of reference. It is difficult to interpret their conduct as anything but a frank acceptance during that time of the plain intendment of section 78fff(c)(1) about which this Court has said: "It is clear that the standards governing SIPA liquidations are established by §78fff(c)(1). . . ." *SIPC* v. *Charisma Securities Corp.*, 506 F.2d 1191, 1193 (2d Cir. 1974). Yet they now question the obvious import of that unambiguous provision.

The petitioners' argument is of the classic "straw man" variety. After demonstration of elementary truths, *e.g.*, the jurisdictional differences when District Courts sit as courts of bankruptcy and when they do not, the petitioners' analyses conjure a wall of institutional separation between the two which they urge the 1970 Act was not intended to breach. Hence their arcane conclusion that 1970 Act proceedings may not be referred to an officer (Referee) of one institution (the District Court sitting as a court of bankruptcy)

because the "other" (the District Court not sitting as a court of bankruptcy) has "exclusive" jurisdiction.

The petitioners' contentions can only be discribed as sheer sophistry which ignores the plain terms of a valid act of Congress. A straightforward view of the 1970 Act can lead to the only reasonable conclusion, namely, that a liquidation proceeding under the 1970 Act is to be handled like any other bankruptcy liquidation except as the 1970 Act clearly otherwise provides or requires. That is hardly a surprising congressional decision since a 1970 Act proceeding is nothing more than a stockbroker liquidation under section 60e of the Bankruptcy Act (11 U.S.C. § 96e) slightly remodelled to achieve the special purposes of the 1970 Act. This proposition is obvious upon a comparison of the relevant portions of section 78fff of the 1970 Act with section 60e of the Bankruptcy Act. It has readily been acknowledged by this Court and others, as well as informed commentators.[5] The legislative history is as clear on this point as is the manifest thrust and language of the 1970 Act.[6]

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[5] SEC v. F. O. Baroff Co., Inc., 497 F.2d 280, 283 (2d Cir. 1974); SEC v. Aberdeen Securities Co., Inc., 480 F.2d 1121, 1123 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973); SEC v. Albert & Maguire Securities Co., Inc., 378 F. Supp. 906, 911 (E.D. Pa. 1974); 3 COLLIER ON BANKRUPTCY ¶¶ 60.82[3], 60.89, 60.90 (14th Ed. 1974); Duffy, *Reforming SIPC*, 7 REV. SEC. REG. 985, 990 (1974).

[6] S. REP. No. 91-1218, 91st Cong., 2d Sess. 4 (1970); H.R. No. 91-1613 91st Cong., 2d Sess. 1 (1970). *See also* legislative history cited at pages 17-18 of the trustee's brief. Highly relevant is the following statement of Senator Bennett of Utah, a ranking minority leader of the Senate Banking and Currency Committee and a member of the Securities Subcommittee when the 1970 Act was enacted: "Mr. President, this legislation establishes procedures for the prompt and orderly liquidation of SIPC members whenever required. These procedures are to be conducted as if they were under section 60(e) of the Bankruptcy Act, which section is the present bankruptcy law governing liquidation of stockbrokers. Certain shortcomings have become apparent in section 60(e), as it applies, specifically, to liquidation of broker/dealers. Therefore, this bill provides that SIPC members will be liquidated in special proceedings outside the Bankruptcy Act. The actual liquidation procedure will be conducted in accordance with, and as though it were being conducted in accordance with and as though it were being conducted under the provisions of Chapter 10 of the Bankruptcy Act, which allows business reorganizations, provided however, that no

Stockbroker liquidations governed by section 60e of the Bankruptcy Act could be handled by Referees pursuant to section 22(a) of the Bankruptcy Act. The petitioners do not dispute that. The fact is that section 60e was not repealed by the 1970 Act but was merely rendered inapplicable to proceedings thereunder by section 78fff(c)(1) since, as noted, the provisions of section 60e were restated and redefined in subparagraphs (A) through (D) of section 78fff(c)(2). Thus, even today a bankruptcy liquidation of a stockbroker which is not a member of SIPC, or as to which SIPC has not commenced a proceeding under the 1970 Act, will continue to be governed by section 60e of the Bankruptcy Act. The anomaly which would result if the petitioners' position were sustained is evident.

It seems quite unnecessary to burden this Court with detailed discussion of the 1970 Act since it has reviewed that legislation on six prior occasions.[7] In recognition of the controlling character of section 78fff(c)(1) this Court has applied various sections of the Bankruptcy Act to 1970 Act proceedings.[8] It has recognized the bankruptcy powers and jurisdiction of the District Court in proceedings under the 1970 Act.[9] Other Courts have similarly acknowledged

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plan of reorganization shall be filed. A trustee shall be appointed and shall have all the powers and duties of a trustee under the Bankruptcy Act. These liquidation procedures have been carefully designed to allow flexibility, to meet the special needs in liquidation of broker/dealers to assure that the customers can receive prompt return of their securities and cash held by such broker/dealers.'' 116 CONG. REC. 40905 (1970).

[7] SIPC v. Charisma Securities Corp., 506 F.2d 1191 (2d Cir. 1974); SEC v. Packer, Wilbur & Co., Inc., 498 F.2d 978 (2d Cir. 1974); SEC v. F. O. Baroff Co., Inc., 497 F.2d 280 (2d Cir. 1974); SEC v. Oxford Securities, Ltd., 486 F.2d 1396 (2d Cir. 1973); SEC v. Alan F. Hughes, Inc., 481 F.2d 401 (2d Cir.), *cert. denied,* 414 U.S. 1092 (1973); SEC v. Alan F. Hughes, Inc., 461 F.2d 974 (2d Cir. 1972).

[8] Sections 241 and 250 [SIPC v. Charisma Securities Corp., 506 F.2d 1191 (2d Cir. 1974)], section 39c [SEC v. F. O. Baroff Co., Inc., 497 F.2d 280, 282 n.3 (2d Cir. 1974)] and sections 60d and 64a(1) [SEC v. Alan F. Hughes, Inc., 461 F.2d 974 (2d Cir. 1972)].

[9] SIPC v. Charisma Securities Corp., *supra,* 506 F.2d at 1194.

that 1970 Act proceedings are essentially bankruptcy proceedings.[10] Until this case no court has doubted, nor has any litigant contested the point, that section 78fff(c)(1) authorizes the reference of 1970 Act liquidations to Referees. At the time of the hearing below there had been 45 references in diverse jurisdictions. Indeed, both this Court and the Court of Appeals for the Eighth Circuit have sustained determinations of the District Courts which affirmed determinations of Referees.[11] Because of the issues presented both courts focussed on the Referee's participation, and the latter Court specifically affirmed on the Referee's opinion.

The short of the matter is that sections 78eee and 78fff are an obvious exercise of Congress' plenary bankruptcy power. In *Louisiana Joint Stock Land Bank* v. *Radford,* 295 U.S. 555 (1935) the United States Supreme Court held that this power

> ". . . extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress." (at 588 n.18). See also *Kalb* v. *Feuerstein,* 308 U.S. 433, 438-439 (1940).

By enacting section 78fff(c)(1) Congress declared that 1970 Act proceedings "*shall* be conducted in accordance with, and as though it were being under" (emphasis added) the provisions of chapters I through VII and X of the Bankruptcy Act to the extent provided in that section, "[e]xcept as inconsistent with the provisions of" the 1970

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10 See, *e.g.*, SEC v. Kenneth Bove & Co., Inc., 378 F. Supp. 697, 699-700 (S.D.N.Y. 1974); SEC v. Schreiber Bosse & Co., Inc., 368 F. Supp 24, 27 (N.D. Ohio 1973); SEC v. Wick, 360 F. Supp. 312, 315 (N.D. Ill 1973). *Cf.* SEC v. First Securities Co. of Chicago, 507 F.2d 417 (7th Cir. 1974).

11 SEC v. F. O. Baroff Co., Inc., *supra,* 497 F.2d at 282 n.3; SEC v. J. Shapiro Co., No. 74-1769 (8th Cir., filed March 12, 1975).

Act. The test of inconsistency was articulated by this Court in *SIPC* v. *Charisma Securities Corp., supra,* 506 F.2d at 1195:

> "A provision is 'inconsistent' with SIPA if it conflicts with an explicit provision of the Act or if its application would substantially impede the fair and effective operation of SIPA without providing significant countervailing benefits."

Substantially the same test is set forth in 3 COLLIER ON BANKRUPTCY ¶ 60.86[3], at 1254 (14th ed. 1974). The petitioners have failed to demonstrate "inconsistency" within the meaning of that test.

The fact is that the participation of Referees in 1970 Act proceedings has greatly served two dominant congressional objectives. First, their participation accomplished the major objective of the 1970 Act, clearly discernible from section 78fff(g) and others, that the claims of customers be satisfied in the swiftest possible manner. Second, their participation served the longstanding congressional objective to relieve District Judges as much as possible of the considerable burdens of bankruptcy and reorganization proceedings. 2 COLLIER ON BANKRUPTCY, ¶ 22.01 at 405 (14th ed. 1975); 6 COLLIER ON BANKRUPTCY ¶ 3.35[1] at 669 (14th ed. 1972). The result espoused by the petitioners is antithetical to those policies, as illustrated by the petitioners' counsel's assertion in the court below that the District Judge should be responsible for the supervision of more than 30,000 claims in this case, as well as numerous other matters.

This Court has twice cautioned that the 1970 Act must be reasonably applied, and that it will not countenance literal approaches which are hostile to its purposes. *SEC* v. *F. O. Baroff Co., Inc., supra,* 497 F.2d at 282; *SEC* v. *Alan F. Hughes, Inc., supra,* 461 F.2d at 980. To those cautions may be added the basic rules of statutory construc-

tion that the Courts will give effect to clear and unambiguous legislative language [*United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Callanan* v. *United States,* 364 U.S. 587, 596 (1961)]; that one section of a statute must be read in context and in harmony with all other sections; [*Boys Markets, Inc.* v. *Retail Clerk's Union,* 398 U.S. 235, 250 (1970); *Richards* v. *United States,* 369 U.S. 1, 11 (1962); *N.L.R.B.* v. *Lion Oil Co.,* 352 U.S. 282, 288 (1957); *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 439 (1935)]; and that under no circumstances may a statute be interpreted so as to produce incongruous results or to emasculate any provision thereof. *Mastro Plastics Corp.* v. *N.L.R.B.,* 350 U.S. 270, 285-86 (1956); *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955). Measured by these principles the petitioners' position seems quite untenable. The bizarre result they would reach can hardly be sustained in the absence of a clear affirmative expression of legislative will to withhold the assistance of Referees in proceedings under the 1970 which will clearly govern most stockbroker bankruptcy liquidations.

The petitioners would meet this Court's test of "inconsistency" by urging that the participation of Referees is inherently inimical to section 78eee(b)(2) of the 1970 Act which confers exclusive jurisdiction upon the District Court over a debtor's property "wherever located." (Petitioners' Brief, pages 27-34). It seems sufficient to answer that the District Courts sitting as courts of bankruptcy also have "exclusive" jurisdiction (28 U.S.C. § 1334); that those courts have all the jurisdiction conferred by the Bankruptcy Act (11 U.S.C. §§ 1(10), 11a); that when sitting as courts in reorganization they possess the additional jurisdiction conferred by chapter X (11 U.S.C. §§ 511 *et seq.*); and that section 78eee(b)(2) of the 1970 Act grants the District Courts the same jurisdiction and powers they possess when sitting both in bankruptcy and reorganization "to the extent consistent with the purposes" of the 1970 Act. It is difficult to imagine how the participation of Referees could

be inconsistent with the 1970 Act while at the same time being such an integral part of the judicial machinery established by Congress in like proceedings which section 78fff (c)(1) makes generally applicable. It seems clear that in 1970 Act proceedings the District Courts do, indeed, sit as courts in bankruptcy. They have essentially the same powers and purpose.

The petitioners (i) seize upon a phrase in the legislative history (the context of which militates against them), (ii) erroneously argue that the 1970 Act was an amendment to the Securities Exchange Act of 1934 (Petitioners' Brief, pages 5-6), and (iii) then argue strenuously that a 1970 Act proceeding was intended to be conducted "outside" the Bankruptcy Act. Their argument is exaggeration, as all of the foregoing demonstrates. The following may be added. The liquidation provisions of the 1970 Act are contained in sections 78eee and 78fff. The remaining eight substantive sections relate to the creation and organization of SIPC, and other matters primarily relating to SIPC, the Securities and Exchange Commission and the self-regulatory organizations. It is understandable that section 78bbb made the provisions of the Securities and Exchange Act of 1934 ("1934 Act") *generally applicable,* but contrary to the petitioners' contention it did not make the 1970 Act *an amendment* to the 1934 Act.[12] That section should be compared with the language of section 78ggg(d) which in fact did amend the 1934 Act. Suffice it to say that sections 78eee and 78fff, the provisions governing liquidation, are replete with references to the Bankruptcy Act, specifically refer to eleven separate sections of Chap-

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[12] This can readily be seen by comparing the language of section 78bbb with earlier versions of this legislation which would have made the 1970 Act an amendment to the 1934 Act. One bill would have amended section 15(b) of the 1934 Act, and woud have added new sections numbered 35 and 36 to the 1934 Act. H.R. 18109, 91st Cong., 2d Sess. §§ 2, 3, 4 (1970). Other bills would have made the 1970 Act section 35 of the 1934 Act. H.R. 18081, 91st Cong., 2d Sess. § 2 (1970); H.R. 18458, 91st Cong., 2d Sess. § 2 (1970).

ters I through VII and X of the Bankruptcy Act and do of course include sections 78eee(b)(2) and 78fff(c)(1). It seems obvious that a 1970 Act proceeding can be said to be "outside" the Bankruptcy Act only to the extent the 1970 Act engrafted special provisions on the Bankruptcy Act scheme.

The trustee's brief aptly describes as disingenuous the petitioners' use of the report of the SIPC Task Force.[13] To that analysis SIPC would add this. Obviously, that report is a most inappropriate tool for ascertaining the intent of Congress several years earlier. But more to the point, in no way could it be reasonably interpreted as a recognition by SIPC or the Task Force that the 1970 Act does not authorize the participation of Referees in proceedings thereunder. The actual use of Referees in a host of proceedings speaks loudly to the contrary.

The trustee, Judge Gurfein and Judge Wyatt were quite correct in their reliance on section 22a of the Bankruptcy Act which is merely a procedural section. In its operation section 78fff(c)(1) will frequently require some adaptation of the provisions of the Bankruptcy Act. The only adjustment here was an order of the court directing the reference, rather than an automatic reference as the literal terms of section 22a authorizes. The adjustment is minor indeed, and really is not much different than the types of adjustments necessary under section 102 of the Bankruptcy Act (11 U.S.C. § 502) which is very much like section 78fff(c)(1). Section 102 makes the provisions of Chapters I through VII applicable in reorganization "insofar as they are not inconsistent or in conflict with the provisions of this chapter." To illustrate, references to Referees are

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[13] In addition to the portions of the report referred to in the trustee's Brief (pages 21-22) which explain the portion quoted by petitioners, it should be noted also that the portion to which petitioners refer is immediately preceded by this statement: "It is recommended, therefore, that the 1970 Act dispense with wholesale incorporation of the Bankruptcy Act and set forth the following powers either expressly or, where applicable, by incorporation of specific provisions of the Bankruptcy Act the following: . . . ."

authorized by section 117 (11 U.S.C. § 517), but most (not all) of the powers and duties provided in section 38 and 39a (11 U.S.C. §§ 66, 67a) are held applicable to a Referee in reorganization. 6 COLLIER ON BANKRUPTCY ¶ 3.13 at 511 n.9, ¶ 3.35[3] (14th ed. 1972).

If it could be supposed that for some reason section 22a of the Bankruptcy Act could not be applicable [and that reason could never be because it refers to petitions filed under the Bankruptcy Act as contended by petitioners],[14] then section 117 of the Bankruptcy Act would provide a clear basis for affirmance. There is no theoretical difference between sections 22a and 117. 6 COLLIER ON BANKRUPTCY ¶ 3.35[1] at 669 (14th ed. 1972). They serve the same good purpose. The only difference is the greater degree to which matters are reserved to the District Judge under section 117, primarily matters related to plans of reorganization. Since the 1970 Act specifically prohibits reorganization, the net result of a choice between sections 22a and 117 could hardly be material.

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[14] Obviously sections of the Bankruptcy Act will refer to other provisions of the Bankruptcy Act. If that were an obstacle to section 78fff(c)(1), the utility of the section would be greatly curtailed thereby leaving the 1970 Act without the necessary support of the Bankruptcy Act.

CONCLUSION

SIPC respectfully submits that by its clear and unambiguous terms section 78fff(c)(1) of the 1970 Act authorizes the participation of Referees. Not only is such participation not "inconsistent" with the provisions or purposes of the 1970 Act, but a contrary view of section 78fff(c)(1) would be most "inconsistent" therewith as well as with the general policy of Congress with respect to insolvency matters of this type. Judge Wyatt was clearly correct in his determination, readily made from the bench after review of the briefs of the parties. His order should be affirmed, with costs to the respondents.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

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On April 3, 1975, I served the within

IN THE
UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 73-3012

Exchange National Bank of Chicago, Robert E. Slater, All-American Life & Casualty Company, General United Life Insurance Company, and O'Hare International Bank (N.A.), Petitioners,

against

Inzer B. Wyatt, United States District Judge, Southern District of New York, and Roy Babbitt, Bankruptcy Judge, Southern District of New York, Respondents.

Securities and Exchange Commission, Plaintiff

against

Weis Securities, Inc., ET AL., Defendants

ANSWER AND BRIEF OF RESPONDENT
SECURITIES INVESTOR PROTECTION
CORPORATION

on the related counsel in said action, by placing the proper number of copies each thereof enclosed in a sealed envelopes and MAILED ~~hand deliv-er~~ addressed as follows:

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Honorable Roy Babbitt
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The Honorable Inzer B. Wyatt
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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 3, 1975, at Washington, D. C.

George M. Bernier

George M. Bernier